In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 300

JAMES CHARLES POLLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of New York of fraudulent use of wire communications, in violation of 18 U.S.C. 1343. He was sentenced to three years' imprisonment. The court of appeals affirmed from the bench (Pet. App. A.).

The government's evidence revealed that on September 11, 1962, a man calling himself Al Martin made five calls from Washington, D.C. to a Mrs. Le-

Boutillier in New York demanding $700. He stated that the money was owed to him by her son, Timothy, who was being held until payment was made. She was directed to wire payment by money order, imprinted with an identifying number, to a William Anderson, payable on sight (G.A. 2a-3a).[1] His directions were followed and the money order was received at Western Union by a man whom a Western Union employee identified at the trial as petitioner (G.A. 4a, 7a, 8a, 9a). The number imprinted on the money order was identified as petitioner's Marine Corps identification number (G.A. 11a-12a). The defendant neither took the stand nor offered evidence in his behalf. The court instructed the jury that the matter of sentence was not to enter into its deliberations (G.A. 15a; P.A. 19). Nevertheless, the jury returned a recommendation of leniency with its verdict of guilty (P.A. 25). Petitioner immediately requested a polling of the jury; all jurors adhered to the verdict. Petitioner's motion for mistrial was denied.

Petitioner's claim that the jury's recommendation of leniency invalidated its verdict is unsound. While, in the absence of statute, a recommendation of mercy by a jury is surplusage, the verdict rendered is not thereby vitiated. See, *e.g.*, *Krull* v. *United States*, 240 F. 2d 122, 133-134 (C.A. 5), certiorari denied, 353 U.S. 915; *Thlinket Packing Co.* v. *United States*, 236 Fed. 109, 113 (C.A. 9); *United States* v. *Mankowski*,

[1] "G.A." refers to the government's appendix in the court of appeals. "P.A." refers to the petitioner's appendix in the court of appeals.

179 F. Supp. 667 (E.D. Wisc.). The case upon which petitioner relies, *United States* v. *Louie Gim Hall*, 245 F. 2d 338 (C.A. 2), is distinguishable. There, the recommendation of leniency was presented only after lengthy deliberation, during which time the judge offered to consider any such recommendation in an apparent attempt to facilitate the reaching of a verdict. Here, in sharp contrast, the court specifically instructed the jury not to consider the matter of punishment at all. There is no showing, other than unfounded speculation, that the recommendation of leniency resulted from a compromise verdict. Immediately after their verdict, the jurors were polled and all adhered to the verdict of guilty.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorney.

JULY 1967.

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